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No. 81-2200

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE MINERS AND MERCHANTS BANK
OF ROUNDUP, MONTANA,

Petitioner,

vs.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M&S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Respondent.

ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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I.

THE UNDISPUTED FACTS INDICATE A DENIAL OF DUE PROCESS BECAUSE CONCEDED FACTS ARE IMPEACHED AND STANDARDS OF JUSTICE ARE USED WHICH ARE CONSTITUTIONALLY IMPERMISSIBLE.

(1) Generally

This Court has indicated it will intervene to review the decision of a state supreme court where there is "impeachment of conceded facts" or where "undisputed facts indicate use of incorrect constitutional standards of justice". Stein v. New York, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct. 1077 (dicta).

As to the facts advanced by Petitioner in its Petition for Writ of Certiorari, there are no disputed or conflicting facts or contested inferences as to these facts. Respondent has not in his answer brief sug-

gested otherwise. Thus, to each of the three issues (interest, res judicata, and conversion) raised in the petition herein, the facts are admittedly undisputed.

Respondent's Brief merely offers conclusions as to the meaning of certain court opinions which are contrary to the conclusions actually reached in those opinions. Further, it offers a few claimed facts that are nowhere in the record and are not material to Petitioner's claims.

(2) Conversion Issue

Respondent does not contest any of the facts of record advanced by Petitioner on this issue, nor any of the law.

Respondent only contends that his interpretation of the Montana Supreme Court opinion is that that Court did not find conversion of real property.

The Montana Supreme Court clearly and specifically affirmed an award of $411,935 for what it referred to as "conversion of

feedlot and elevators" (Opinion, p. A-102, Appendix), the "ouster from the feedlots and elevators" (Id., p. A-129), and "property taken by the bank and sold as collateral for the indebtedness due it" (Id., p. A-130). Respondent in his Brief admits this when he characterizes the Montana Supreme Court's decision as one where that Court concluded that Petitioner "wrongfully took control of the assets of the respondents" (Respondent's Brief, p. 5). The definition of conversion is "a wrongful taking", the exact same words used by the Montana Supreme Court and Respondent himself.

Respondent does not contest that: 1) Respondent's complaint in the action sought damages for conversion of real property; 2) The issue of conversion was raised by Petitioner at every stage of the proceedings; 3) Damages for conversion of real estate is not allowed in any jurisdiction;

4) Petitioner raised the conversion issue in terms of due process under the federal Constitution during the rehearing process, which was its first opportunity to do so as to the ruling of the Montana Supreme Court, which ruling could not have been anticipated.

All that is at issue is what the Montana Supreme Court did in its opinion and whether that constituted denial of due process. The Brief of Respondent does not really respond, almost leaving the implication that he concedes this argument.

(3) Interest Issue

Respondent does not contest any of the facts of record advanced by Petitioner on this issue, nor any of the law.

Respondent makes only two contentions: 1) The Petitioner did not plead and prove interest; and 2) Respondent's interpretation of the Montana Supreme Court's Opinion is that that Court did not say Petitioner

was entitled to any interest and denied all of the same because of: a) The bank's wrongful actions; and b) Because the bank sought double recovery.

The first contention is raised here for the first time; at no stage in the earlier proceedings did Respondent urge that Petitioner did not plead for interest. The district court of original jurisdiction awarded interest, and nowhere in Respondent's pleadings or in his briefs to the Montana Supreme Court did Respondent suggest such an award was improper because it had not been pled. Furthermore, the contention is untrue; the collection on all promissory notes (including principal and interest) was included as an issue by stipulation. Much of the injustice of this case arises from just such late arguments advanced by Respondent and accepted by the Montana Supreme Court without an opportunity for Petitioner to be heard on the

matters.

As to the second contention, the Montana Supreme Court explicitly stated that Petitioner was entitled to interest. Interest was denied, however, on the much different contention, namely, there was no evidence in the record from which to calculate the amount:

> "Petitioner bank contended it is entitled to a set-off for interest accrued on the principal indebtedness on the notes from the date of breach until the monies received on foreclosure by the bank were applied on the notes. We so indicated in our opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case."
>
> Opinion, p. A-187, Appendix (emphasis supplied)

That statement appeared in the Court's order denying Petitioner's request for rehearing. While the Montana Supreme Court did deny interest on monies received from foreclosure to date of judgment in the

court of original jurisdiction on the grounds that the Petitioner had taken more property as valued by the court than the principal indebtedness due the Petitioner, nowhere did the Montana Supreme Court state that interest to the date monies were received on foreclosure was not available because of any wrongful taking or because of any double recovery.

All that is at issue is whether the amount of such interest that the Montana Supreme Court held the Petitioner was entitled to was or was not determinable from undisputed facts before that Court.

Respondent does not, by his silence on the points, dispute that: 1) Petitioner at every stage in the appeal (up to the Court's order denying Petitioner's request for a rehearing) urged without objection or contrary argument from Respondent that the amount of interest from the date of taking of the properties to the date of sale was

proposed as a stipulation by counsel for Respondent and so stipulated by Petitioner's counsel to be $35,962.93 after all set-offs; 2) Prior to the Court's order denying Petitioner's request for a rehearing, there had been no suggestion by the Court or Respondent that the amount of interest was even at issue in the case; 3) After the Montana Supreme Court's denial of the request for rehearing, which was timely, no mechanism existed for further review under Montana law or court rule; 4) Petitioner, in raising the due process question for the first time in its Petition for Writ of Certiorari raised the issue at its first opportunity to do so, and the Court's ruling could not have been anticipated. The Montana Supreme Court's decision, therefore, involves impeachment of conceded facts.

(4) Res Judicata Issue

Respondent does not contest any of the

facts of record advanced by Petitioner on this issue and contests none of the law.

Petitioner urged the following: 1) In separate legal actions involving the same parties and property, both real and personal, Petitioner, in a lawful manner and under court authority, proceeded to repossess, foreclose, and reduce to money judgment certain claims of Petitioner; 2) None of the judgments were appealed or set aside or collaterally attacked; 3) Petitioner, at all stages from the inception of the suit through the appeal, prominently and properly raised the issue of res judicata; 4) The doctrine that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other court of concurrent jurisdiction, is

well-recognized in Montana; 5) At no time has a court in this case, including the Montana Supreme Court, responded to Petitioner's prominent argument or suggested that it lacked merit; and 6) Petitioner raised the res judicata issue in terms of due process under the federal Constitution during the rehearing process, which was its first opportunity to do so as to the Montana Supreme Court, which ruling could not have been anticipated.

Respondent advances only two matters on this issue. The first is that the Montana courts treated the issue as "clearly frivolous". (Respondent's Brief, p. 7). This is palpably contradicted by the record of opinions set forth in Petitioner's Appendix. No reference to this issue exists in any of the Montana Supreme Court's or the lower court's orders or opinions. The failure and refusal of a court to deal with a prominent argument

does not constitute a treatment of clear frivolity. Rather, if anything, it suggests support for Petitioner's contention that constitutionally-required standards of justice have not been observed.

Here again, as with other matters previously advanced, there is a disagreement by the parties as to the meaning of the Montana Supreme Court's opinion, but no issue as to evidence and facts of record, nor any conflict in the inferences to be drawn from them.

Respondent's second contention on this issue involves a claimed fact (raised for the first time here) that: a) Is not established in the record; and b) Is actually contradicted by the record.

That contention of Respondent, at pp. 4-5 of his Brief, is that Petitioner "extrajudicially seized and voted the stock of four corporations owned by the Respondents, thereby obtaining control of the

corporations. Later, the bank suffered judgment to be taken against the corporations it controlled".

Respondent neither cites to the record nor appends any part of the record to give support to his proposition first raised here. The reason he cannot do so is that there is no evidence of record in this entire case that even comes close to establishing this proposition.

There is some uncontradicted evidence in this case which tends to show the falsity of the last-minute collateral attack on the judgments. The Order of April 11, 1972 set out in the Appendix at p. A-14 specifically refers to both parties appearing through counsel, that case being one of the judgments referred to as being res judicata as to this case. The order and judgment in that case were judicially noticed by the lower court of original jurisdiction in the instant case.

If Respondent truly wishes to urge that this Court or any court look to the files of the case set out in the Appendix at p. A-14 and deal with Respondent's collateral attack, that court will find that Respondent's law firm regularly appeared in and represented Respondent at all stages and will find that the very issue of such asserted ownership and control was raised in that case and disposed of in Petitioner's favor through the Summary Judgment at page A-16 of Petitioner's Appendix, which judgment reflects that the lower court granted "summary judgment in favor of Plaintiff and against Defendants and each of them on all issues". It is uncontested that Respondent did not appeal that judgment.

In fact, the move to summary judgment on that issue was advanced by Respondent, as reflected in the Motion for Summary Judgment appended hereto, and signed by

Respondent's previous counsel, Charles F. Moses (the same counsel who initially appeared for Respondent in the instant case).

In any event, such a contention amounts to a collateral attack which is beyond the pleadings of this case.

(5) Financial Ruin of Respondents

Nowhere in the findings of the court of original jurisdiction is there any reference to the Petitioner "causing the financial ruin of Respondents" (Brief of Respondent, p. 4). In any event, the presence or absence of this claimed fact, unsupported by the record, has no bearing on the merits of any fact or argument advanced by Petitioner.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED constitutional standards of justice have been ignored and conceded facts have been impeached sufficient to warrant review by This Court, and the Petition for a Writ of Certiorari should be granted.

II.

PETITIONER RAISED THE CONVERSION AND RES JUDICATA ISSUES IN TERMS OF DUE PROCESS UNDER THE FEDERAL CONSTITUTION DURING THE REHEARING PROCESS AND THE INTEREST ISSUE AFTER THE PETITION FOR REHEARING WAS DENIED, WHICH WAS ITS FIRST OPPORTUNITY TO DO SO AS TO EACH RULING OF THE MONTANA SUPREME COURT, WHICH RULINGS COULD NOT HAVE BEEN ANTICIPATED.

It is understood that the general rule is that a constitutional question is urged too late if put forward on a petition for rehearing.

There is a well-recognized exception to the general rule where the decision of the state's highest court is the act complained of, and it could not have reasonably been anticipated.

Thus, in Great Northern R. Co. v. Sunburst Oil & Ref. Co. (1932), 287 U.S. 358, 77 L.Ed. 360, 367-68, 53 S.Ct. 145, 85 ALR 254, where the first mention of the 14th Amendment to be found in the record was in the Petition for Rehearing, the Court spoke to the "well-recognized exception" and stated:

> "The rule, general as it is, does not extend to cases . . . where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right."

And, in Missouri ex. rel. Missouri Ins. Co. v. Gehner (1930), 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326, where it was claimed that a calculation by the State Supreme Court denied U.S. constitutional rights, the Petitioner for a Writ of Certiorari first raised the federal question in a Motion for Rehearing, and the State Supreme Court did not refer to the federal question in denying the petition. The

Court noted the exception applicable in this case:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. [citation]. But here the company, at the first opportunity invoked the protection of the federal constitution and statute. It would not earlier have assailed the section as violative of the constitution and laws of the United States."
>
> Ibid, at p. 875.

And, in Herndon v. Georgia, 295 US 441, 79 L.Ed. 1530, 55 S.Ct. 794, the Court focused the test for the exception on whether the State Supreme Court's decision could have been anticipated by a reading of prior decisions, holding that the assertion of a federal claim in a petition for rehearing was not timely where the State Supreme Court's decision could have been

anticipated by a reading of prior decisions and noting at page 1533:

> "There is no doubt that the federal claim was timely if the ruling of the state could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. [citation]. The whole point, therefore, is whether the ruling here assailed should have been anticipated."

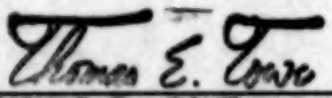
Even where a federal question under due process and the 14th Amendment was not raised until after the State Supreme Court had refused to consider an application for rehearing, the federal question was timely raised in Saunders v. Shaw, 244 US 317, 61 L.Ed. 1163, 37 S.Ct. 638, the Court stating:

> ". . . when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision

of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."

WHEREFORE, IT IS RESPECTFULLY SUBMITTED the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, THOMAS E. TOWE, attorney for Miners & Merchants Bank, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on July 12, 1982, I served three (3) copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari on the Respondent herein, by mailing the

copies in a duly addressed envelope, with first class postage prepaid, to Ken Tolliver, Esq., Attorney of Record for Respondent, at Post Office Box 1977, Billings, Montana, 59103.

Thomas E. Towe

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IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

NO. 7054

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,

Plaintiff,

-vs-

AGRI-SERVICES, INC., L.D. STENSVAD, M & S CATTLE FEEDERS, M-V ENTERPRISES, INC. and L.D. STENSVAD CATTLE CO.,

Defendants.

MOTION FOR SUMMARY JUDGMENT

COMES NOW L. D. Stensvad, defendant herein, and respectfully moves the Court for summary judgment in the above entitled action. This motion is made and based upon the following:

1. That the Miners and Merchants Bank have asserted ownership and control over Agri-Services, Inc., M & S Cattle Feeders, M-V Enterprises, Inc., and are now in com-

plete control and charge of said corporations and that the same is in full satisfaction of all claims and does, as a matter of law, release the guarantor from any obligation.

2. That the Miners and Merchants Bank have asserted ownership and control over Agri-Services, Inc., M & S Cattle Feeders, M-V Enterprises, Inc., and are now in control of said corporations so as to alter the original obligations between the parties and to impair the remedies or rights of the parties in respect thereto.

This motion is based upon the records and files in the District Court of the Fourteenth Judicial District of the State of Montana in and for the County of Musselshell, and will be supported by oral testimony to be presented at the time of the hearing.

DATED this 4th day of May, 1972.

SANDALL, MOSES & CAVAN
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Billings, Montana 59101

By Charles F. Moses
Attorneys for Defendants

Attachment-3